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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33995

SF&L RAILWAY, INC.–ACQUISITION AND OPERATION EXEMPTION–TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE AND PEORIA, IL

STB Finance Docket No. 33996

KERN W. SCHUMACHER AND MORRIS H. KULMER–CONTINUANCE IN CONTROL EXEMPTION–SF&L RAILWAY, INC.

STB Docket No. AB-448 (Sub-No. 2X)

SF&L RAILWAY, INC.–ABANDONMENT EXEMPTION–IN HANCOCK, MCDONOUGH, FULTON AND PEORIA COUNTIES, IL[1]

Decided: January 31, 2003

On December 13, 2002, SF&L Railway, Inc. (SF&L) and Messrs. Kern W. Schumacher and Morris H. Kulmer, the current owners of SF&L (collectively, Petitioners), jointly filed a petition to reopen and reconsider our decision served on October 17, 2002 (SF&L-La Harpe). In that decision, we revoked the exemptions in these proceedings and ordered SF&L to reconvey its interest in the line it had acquired. In the alternative, Petitioners request clarification of the SF&L-La Harpe decision and request that the order to reconvey be held in abeyance until 10 days after a ruling on their petition. Replies were filed by Keokuk Junction Railway Co. (KJRY) and jointly by the United Transportation Union-Illinois Legislative Board (UTU-IL), McDonough County, and the City of Macomb, IL (collectively, the UTU-IL parties). The petition to reopen will be granted in part as set forth below. SF&L's petition for an exemption to permit it to abandon service over the line it had acquired will be dismissed.

BACKGROUND

On December 29, 2000, SF&L acquired, for about $2.18 million, the operating easement over, and the rail, ties, and certain improvements on, a 71.5-mile segment of rail line in Illinois between milepost 194.5 at La Harpe and milepost 123.0 at Peoria (the La Harpe Line or Line) from Toledo, Peoria and Western Railway Corporation (TP&W) pursuant to a class exemption

[1] These proceedings are not consolidated; they are being considered together for administrative convenience.

invoked in STB Finance Docket No. 33995.[2] At the same time, Messrs. Schumacher and Kulmer invoked an exemption from the usual regulatory requirements to allow them to continue in control of SF&L after it became a rail carrier. Petitions to revoke the exemptions were filed by KJRY, UTU-IL on its own, and jointly by the UTU-IL parties.

In SF&L-La Harpe, we concluded that Petitioners had abused the class exemption process (an expedited way for noncarriers to acquire rail lines for continued rail service) by purchasing the La Harpe Line with the intent to abandon and salvage it. We ordered SF&L to reconvey its interest in the La Harpe Line to TP&W within 30 days of the decision's service date.[3]

Shortly before we issued SF&L-La Harpe, SF&L filed a petition for exemption to abandon the La Harpe Line in SF&L Railway, Inc.–Abandonment Exemption–in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X). In anticipation of the reconveyance, TP&W, on October 30, 2002 (before SF&L had sought reversal of the decision requiring the reconveyance), filed a motion to substitute itself for SF&L in the petition for exemption from abandonment regulation. Action had been deferred on SF&L's petition for exemption from abandonment regulation and on TP&W's motion to substitute itself for SF&L in the abandonment proceeding to allow us to address SF&L's petition to reopen and reconsider the SF&L-La Harpe decision.

DISCUSSION AND CONCLUSIONS

Petition to Reopen.

1. Preliminary Matters. Petitioners labeled their pleading a petition for reconsideration or reopening. Because reconsideration petitions must be filed within 20 days of the issuance of a decision (unless we have granted an extension of up to 20 days pursuant to 49 CFR 1115.3), and this petition was filed outside that time limit, we will consider it a petition to reopen under 49 CFR 1115.4. In any event, the standards for granting either reconsideration or reopening are similar. See Schneider Transport, Inc., Et Al.–Petition for Exemption, Docket No. 40784 (ICC served Mar. 3, 1995). Here, Petitioners claim that the SF&L-La Harpe decision involves material error and is affected materially by changed circumstances.

2. Material Error. Petitioners argue that, under 49 U.S.C. 10502(d), exemptions may be revoked only when we find "that application in whole or in part of a provision of this part . . . is

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[2] TP&W is controlled by RailAmerica, Inc. (RailAmerica), a noncarrier holding company.

[3] The day after we issued the SF&L-La Harpe decision, SF&L embargoed the line, citing "track conditions" as the reason.

necessary to carry out the [rail] transportation policy of [49 U.S.C.] 10101," and that we made no such finding here. An exemption expedites and simplifies certain cases where a more searching regulatory inquiry is not necessary to advance the rail transportation policy (RTP), by relieving parties of some of the requirements that would apply under the otherwise applicable regulatory provision. Here, we are not revoking the exemption simply to force SF&L to pursue its transaction under the procedures of 49 U.S.C. 10901. Rather, we are acting to protect our processes by forcing SF&L to undo the transaction entirely.

Contrary to Petitioners' assertion, any government agency has inherent authority to act to ensure "the fairness, efficiency, and integrity of its processes and the appropriateness of the conduct of the parties appearing before it." Railroad Ventures, Inc. v. STB, 299 F.3d 523, 563-64 (6th Cir. 2002) (quoting Unbelievable, Inc. v. N.L.R.B., 118 F.3d 452, 454 (D.C. Cir. 1994) (Wald dissenting) (citations omitted)). We have previously relied on that inherent authority to revoke the purchase of a line upon finding that the acquiring party did not really intend to continue rail service. See Land Conservancy–Acq. & Oper.–Burlington Northern, 2 S.T.B. 673 (1997) (Land Conservancy), reconsideration denied, STB Finance Docket No. 33389 (STB served May 13, 1998), petition for judicial review dismissed sub nom. The Land Conservancy of Seattle and King County v. STB, 238 F.3d 429 (9th Cir. 2000). See also Track Tech, Inc.–Abandonment Exemption–in Adair and Union Counties, IA, STB Docket No. AB-493 (Sub-No. 7X) (STB served Nov. 1, 1999) (Track Tech) and Minnesota Comm. Ry., Inc.–Trackage Exempt.–Burlington Northern RR. Co., 8 I.C.C.2d 31 (1991) (both recognizing our authority to revoke sham transactions to ensure the integrity of our processes).

Notwithstanding our inherent authority, we did consider the RTP in revoking the exemptions here. See SF&L-La Harpe at 11 (citing 49 U.S.C. 10101(7), directing us to facilitate entry into the rail business). Specifically, we stated that our class exemption process, which was designed to facilitate entry into the rail business, may not be used to acquire rail lines for the purposes of abandoning and salvaging them. We indicated and reiterate here that we are convinced that SF&L did not really intend to enter the railroad business, but rather intended to facilitate the business of its affiliated company, A&K Materials, Inc., by salvaging the rail and related materials in the Line. For this reason, revocation of the exemptions was fully consistent with other provisions of the RTP, including 49 U.S.C. 10101 (4) (ensuring the development and maintenance of a sound rail system, (5) (fostering sound economic conditions in transportation), and (9) (encouraging honest and efficient management of rail carriers). See, e.g., Class Exemption–Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 817 (1985) (Class Exemption), aff'd without opinion sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

Petitioners claim that their operation of the Line for some 10 months shows that we committed material error in finding that they really intended to salvage the Line. They assert that their willingness to incur losses (alleged to be approximately $200,000) demonstrates their

sincere commitment to the railroad business.[4] We disagree. Petitioners purchased this line 2 years ago for about $2.18 million, and they claim that, then as well as now, the salvage value of the rail and related materials was $5.7 million or more. Petitioners' willingness to incur losses in the short run in anticipation of earning net profits of over $3 million in the long run does not indicate a sincere commitment to operate the Line.[5]

Petitioners also allege that we should now permit them to file a full application to acquire the La Harpe Line under 49 U.S.C. 10901. But the authority they would seek under 49 U.S.C. 10901 would be for acquiring and *operating* a rail line, rather than acquiring, abandoning, and salvaging, which we have found was the Petitioners' real intent here. See Land Conservancy, decision served May 13, 1998, at 11 (after having revoked an exemption that had allowed a party to acquire a rail line, denying the party's request to file an individual petition for exemption because "the use of an individual acquisition procedure to accomplish [the party's] goal would be no less objectionable than the use of the class exemption procedures.").

3. Changed Circumstances. Petitioners contend that there is a changed circumstance that justifies reopening the SF&L-La Harpe decision. Specifically, Petitioners argue that TP&W's insistence that, for reconveyance of the Line, it need only pay SF&L the same amount that SF&L paid it for the Line, is contrary to the terms of the SF&L-La Harpe decision and constitutes materially changed circumstances. Additionally, Petitioners argue that requiring reconveyance of the Line for less than the net liquidation value (NLV) would be contrary to 49 U.S.C. 10904 and 10907, and would constitute a taking of property without just compensation in violation of the due process clause of the Fifth Amendment. We will reopen our revocation decision to clarify the terms of the reconveyance that we have ordered.

Clarification.

1. Reconveyance Price. Analogizing to 49 U.S.C. 10904 and 10907, SF&L contends that it is entitled to receive at least the NLV of the Line (which SF&L alleges is approximately $5.7 million) upon reconveying it to TP&W. But section 10904 requires a rail line owner that would otherwise be authorized to abandon a line to instead sell the line to a financially

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[4] Petitioners recently requested leave to introduce a statement allegedly demonstrating that they have lost over $450,000 on the Line, and the UTU-IL parties opposed that request. Even if Petitioners' loss were the larger figure, it would not alter our analysis here.

[5] Petitioners claim that we declined to revoke the exemption invoked in Track Tech notwithstanding that the facts there were "much more supportive of an inference of a lack of serious intent to operate the rail line at issue." Petition to Reopen and Reconsider at 8. In Track Tech, we found a failure to present credible evidence of an abuse of Board processes. Here, we discussed in exhaustive detail the evidence underlying our finding of an abuse of Board processes. Petitioners raise nothing of substance in their efforts to relitigate the matter.

responsible person, and the statute expressly provides that the purchaser must pay at least the fair market value of the line. And under section 10907, the owner of a rail line as to which we have made certain findings must sell the line to a purchaser, and again, the statute expressly provides that the purchaser must pay not less than the constitutional minimum value of the line. Under either of these statutory provisions requiring payment of the constitutional minimum value, the sale at issue would not occur but for the regulatory rights conferred by the statute.

In contrast, the statute did not force the original sale here, and we are not "taking" any property that SF&L rightfully has acquired. Rather, because we have found it necessary to "undo" a purchase that was accomplished only through the misuse of a regulatory exemption that was not properly available, the reconveyance is meant simply to return the parties to the status quo ante.[6] Logically, this means that TP&W should reacquire the La Harpe Line and that SF&L should get back its purchase price, with reasonable interest to account for TP&W's having had the use of SF&L's money.

SF&L argues that requiring it to sell back the Line for less than its NLV constitutes a penalty for which we lack statutory authority. To the contrary, requiring TP&W to pay the NLV for this Line would be tantamount to rewarding SF&L for a purchase that should not have been allowed, by giving it back more than it paid for the Line. As we stated in ordering divestiture, persons who engage in an abuse of our processes should not be allowed to profit from their misconduct. SF&L-La Harpe at 19. Nor are persons entitled to be reimbursed for any operating losses incurred as a result of an activity in which they do not have "clean hands."

2. Interest. Recognizing that it has had the use of the money paid by SF&L, TP&W does not object to paying "reasonable interest," which it suggests should be calculated according to 49 CFR 1141 (interest rate for complying with a Board decision in a complaint or investigation proceeding: "the coupon equivalent yield . . . of marketable securities of the United States Government having a duration of 91 days."). SF&L claims that TP&W should pay interest at a rate equivalent to the railroad industry's "cost of capital."[7] But the cost of capital is a goal as to what railroads should be able to earn, under "honest, economic, and efficient management," and

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[6] Indeed, in establishing the class exemptions that Petitioners improperly used here, the Interstate Commerce Commission "specifically reserve[d] the right to require divestiture" when it ordered revocation of exemptions. Class Exemption, 1 I.C.C.2d at 812.

[7] Under 49 U.S.C. 10101(3), we are directed to regulate in a way that allows rail carriers to earn "adequate" revenues, and the provision at 49 U.S.C. 10704(a)(3) requires us to determine annually which rail carriers are earning "adequate" revenues. We annually calculate the average cost of raising capital for the nation's railroads, to be used in our determination of whether a railroad is earning "adequate" revenues.

not a guarantee of what railroads actually earn.[8] Here, where we are ordering a rail carrier to return money and provide a fair amount of interest to reflect the rail carrier's having had use of the money, we apply the "T-bill rate" specified in the regulation quoted above.[9] Giving SF&L a higher rate of return would reward improper behavior.

3. Entity to Which Line Should Be Transferred. Petitioners seek clarification as to whether they should transfer the line to TP&W or to a new corporate entity that RailAmerica has created to take over this property. Because we are here undoing the transaction by which SF&L acquired the Line from TP&W, TP&W is the entity to which the Line should be reconveyed.

4. Effective Date of Reconveyance. Finally, because of what Petitioners submit is uncertainty surrounding reconveyance, they request that the effective date of this decision be set at 10 days after service. On the other hand, the UTU-IL parties ask that we order reconveyance of the line immediately upon service of this decision. Although we are sympathetic with the request that reconveyance occur as soon as possible, we recognize that the parties may need some advance notice in order to make the necessary arrangements for the reconveyance. Therefore, we will set the effective date of this decision, which is also the date by which Petitioners must reconvey the La Harpe Line, at 10 days after the service date of this decision.

Labor Protection.

Arguing that Petitioners' actions in purchasing this Line constituted a "de facto abandonment," UTU-IL asked us to impose the standard labor protective conditions that, under the statute, we must impose upon line abandonments. See 49 U.S.C. 10903(b)(2) (requiring, on approvals of abandonments, "provisions to protect the interests of employees").[10] UTU-IL seeks the imposition of these conditions "from the effective date of the exemption to the revocation date. . . ." Motion for Imposition of Labor Protective Conditions at 7.

We will not impose the labor protective conditions on the purchase at issue here, improper though it was, because the Line was not in fact abandoned (and in any case, UTU-IL has not established that any employees were adversely affected by TP&W's sale of the Line to

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[8] In our most recent determination, we found that none of the nation's large (Class I) railroads had earned "adequate" revenues (equal to the rail industry's cost of capital) for the year 2001. Railroad Revenue Adequacy–2001 Determination, STB Ex Parte No. 552 (Sub-No. 6) (STB served July 19, 2002).

[9] For example, we consider the T-bill rate to fully repay the shippers for the railroads' use of their money when we order reparations upon finding that a rail rate is unreasonably high.

[10] The standard labor protective conditions that apply to rail line abandonments were set out in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

SF&L). Moreover, TP&W has stated that, upon reconveyance, it plans to operate the Line (not embargo it like SF&L) until such time as it either sells the Line or receives our authority to abandon it. TP&W Response at 11-12. We can address employee protection issues as appropriate when they are before us in a future proceeding.

STB Docket No. AB-448 (Sub-No. 2X).

In SF&L-La Harpe at 3-4, we stated that we would dismiss as moot SF&L's petition for an abandonment exemption in STB Docket No. AB-448 (Sub-No. 2X). Having decided to deny Petitioners' request to reopen and reconsider our order directing them to reconvey the La Harpe Line to TP&W, SF&L's petition for an abandonment exemption in STB Docket No. AB-448 (Sub-No. 2X) will be dismissed. TP&W has urged that, instead of dismissing the petition in STB Docket No. AB-448 (Sub-No. 2X), it should be allowed to substitute itself for SF&L as the party seeking abandonment authority. Our objective in revoking the acquisition and operation exemption, however, was to return the parties to the status quo ante. Dismissing STB Docket No. AB-448 (Sub-No. 2X) will give TP&W an opportunity to resume operations over the Line while evaluating its options, which may include continuation of those operations, sale of the Line to another entity, or TP&W's pursuit of abandonment authority. Accordingly, the petition in STB Docket No. AB-448 (Sub-No. 2X) will be dismissed and TP&W's motion to substitute itself for SF&L in that proceeding will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen is granted in part, and our decision served October 17, 2002, is clarified as indicated in this decision.

2. At the time of reconveyance, TP&W shall pay SF&L $2,179,878 plus interest from December 29, 2000, to the date of reconveyance at the rate specified in 49 CFR 1141(a) and calculated in the manner set forth in 49 CFR 1141(b).

3. UTU-IL's motion for imposition of labor protective conditions is denied.

4. SF&L's petition for an abandonment exemption in STB Docket No. AB-448 (Sub-No. 2X) is dismissed and TP&W's motion to substitute itself for SF&L in that proceeding is denied.

5. This decision is effective 10 days from its date of service.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams
Secretary